IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1973

No. 73-482

STATE OF MICHIGAN,
Petitioner,

v.

THOMAS W. TUCKER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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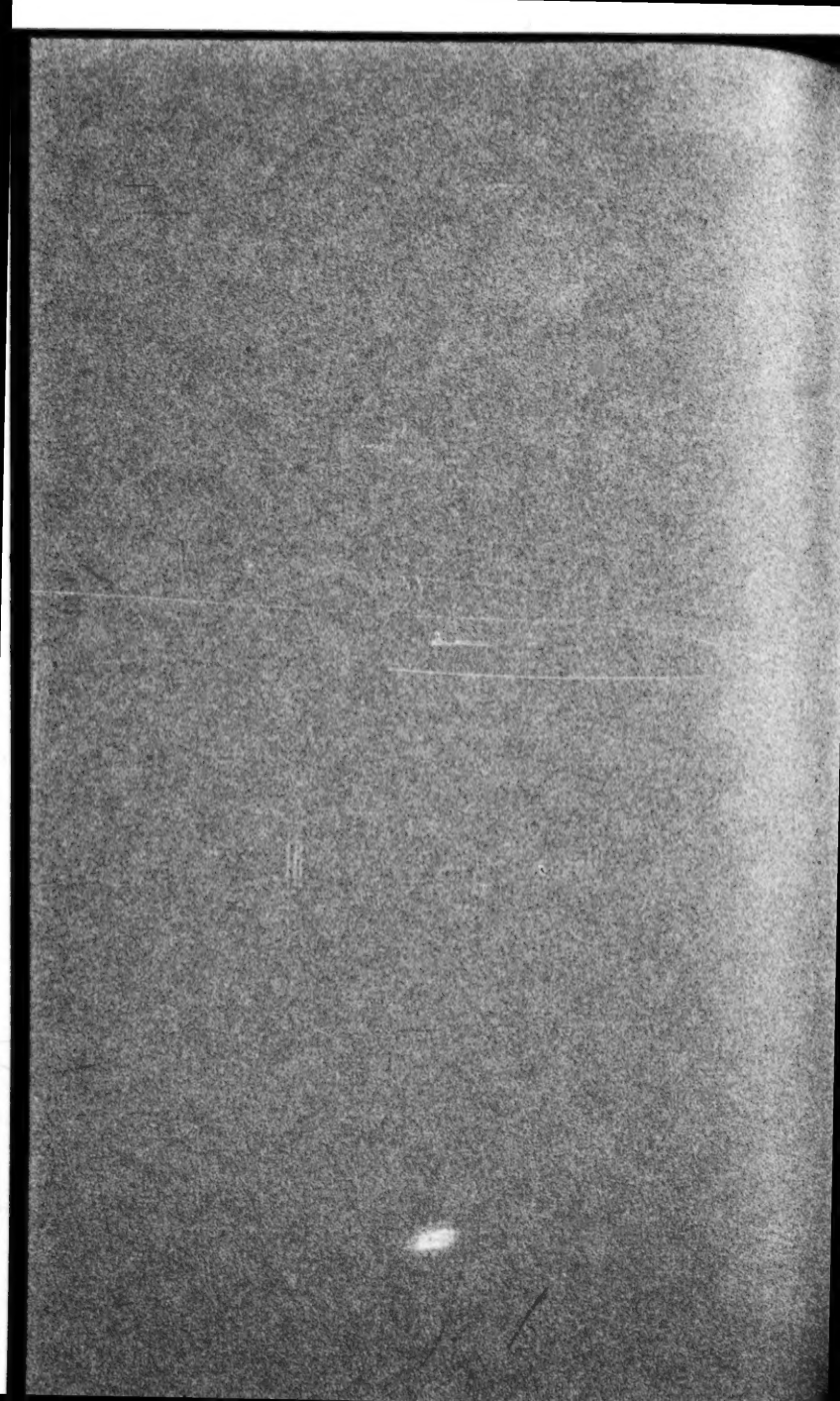

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Now comes L. Brooks Patterson, Prosecuting Attorney in and for the County of Oakland, State of Michigan, by Robert C. Williams, Chief Appellate Counsel, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on June 21, 1973.

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit was filed on June 21, 1973. The decision of the United States District Court, Eastern District of Michigan, Southern Division, was filed on December 22, 1972. The opinion of the Supreme Court of the State of Michigan was filed on August 27, 1971, and is reported at 385 Mich 594; 189 NW2d 290 (1971). The opinion of the Michigan Court of Appeals was filed on October 1, 1969, and is reported at 19 Mich App 320, 172 NW2d 712 (1969). Copies of all four opinions of the lower courts are included in the Appendix to this, Petitioner's Petition for Writ of Certiorari.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was filed on June 21, 1973. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I.

Whether the testimony of a witness is inadmissible under the "poisonous fruits" doctrine when that witness' identity was discovered through a proper pre-*Miranda* interrogation of the defendant which did not meet the standards subsequently set forth in *Miranda* v *Arizona*

II.

Whether the standards set forth in *Miranda* v *Arizona* are too restrictive in excluding admissions and are not mandated by the United States Constitution?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which the above-entitled Petition involves is as follows:

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF FACTS

On April 19, 1966, Miss Marion Corey was found tied, gagged and partially disrobed in her Pontiac Township home by a friend and co-worker, Luther White (R. 44-46). Miss Corey, a 43-year-old lady who lived alone and was a virgin, had been severely beaten and was incoherent. She has never been able to recall what happened to her and has never identified the defendant or anyone else as her assailant.

When Mr. White arrived, he discovered a dog inside Miss Corey's house (R. 60-62), though she did not own one herself (R. 66). Police followed the dog, Sugarfoot, to the defendant's house where it curled up on the porch. Questioning of neighbors by police revealed that the dog belonged to the defendant who lived in that house (R. 102-108). Defendant was located later that day and picked up by the police.

When the defendant was taken to police headquarters, scratches were observed on his face (R. 175) and blood was found on his clothes and undershorts (R. 197-199). He told police that the scratches and blood were caused by a goose he had killed.

Prior to interrogating the defendant on April 19, 1966, the police advised him that he had the right to remain silent and the right to contact a lawyer. He was not advised or any right to a court-appointed attorney. Defendant agreed to talk with the police and told them that at the time of the crime he was with a friend, one Robert Henderson.

The police contacted Henderson in an attempt to confirm the defendant's alibi. Henderson not only refuted the alibi, but also related certain incriminating statements made in his presence by the defendant.

Miranda v *Arizona,* 384 US 436 (1966) was decided by this Court on June 13, 1966. Defendant's trial commenced after that date. As a result, the statements made by the defendant to police were excluded as being in violation of *Miranda, supra.* Henderson, however, did testify as a witness for the prosecution. Henderson stated that the defendant arrived at his house on the day of the crime at about 1:00 p.m., while he, Henderson, was cleaning

a goose he had shot (R. 217-218). Henderson asked the defendant what had happened to his face and whether he had got ahold of "a wild one or something." The defendant replied "something like that" (R. 223). After a few minutes Henderson asked "who it was" and the defendant replied "She's a widow woman" who was in her thirties and lived the next block over (R. 224-225). It was stipulated to by the Prosecution that knowledge of Henderson was obtained through the statements made to the police by the defendant.

The defendant was convicted of rape by the jury and was sentenced to a term of 20 to 40 years imprisonment. In unanimous opinions included in Petitioner's Appendix, the Michigan Court of Appeals and the Michigan Supreme Court affirmed the defendant's conviction. The United States District Court, Eastern District of Michigan, granted the defendant's petition for a writ of habeas corpus stating that Henderson's testimony had been wrongly admitted into evidence at trial. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court. The decisions of both federal courts are also included in Petitioner's Appendix.

REASONS FOR GRANTING THE WRIT

I.

The first question presented by Petitioner is an important federal constitutional question which has been noted, but never answered by this Court. This Petition presents squarely the issue of whether the testimony of a witness whose identity was obtained through the violation of a defendant's Fifth Amendment rights should be suppressed.[1] This is a question which is arising with increasing frequency in both state and federal courts. The wide range of judicial opinion concerning this issue justifies its review in this Honorable Court.

Conflicting opinions as to this federal issue have come from state appellate courts, United States District Courts, and United States Courts of Appeal. Only this Court has yet to enter the field. In the instant case, there is a clear conflict as to the interpretation of the Fifth Amendment of the United States Constitution between the Supreme

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[1] In passing, it should be noted that the police officers who advised the defendant of his constitutional rights prior to interrogation complied with all judicial mandates in existence at that time. *Miranda* v *Arizona, supra,* was not decided until nearly two months *after* the questioning of this defendant took place. Therefore the exclusionary rule as a deterrent of illegal police conduct has no application to this case. Though the police interrogated the defendant in a legal manner at the time they questioned him, the warnings given by the police became insufficient subsequently because of the *Miranda* decision. *Miranda, supra,* was applied to this case because in *Johnson* v *New Jersey,* 384 US 719 (1966), this Court held that *Miranda, supra,* would be applicable to all cases that went to trial after the decision date of *Miranda, supra.* Thus, though the interrogation of the defendant took place prior to *Miranda, supra,* the lower courts have reasoned that the *Miranda* rationale also governs this case.

Court of Michigan and the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit has imposed a more restrictive interpretation of the Fifth Amendment upon the People of Michigan than this Court or the Michigan Supreme Court has ever ruled proper. In affirming defendant's conviction for a brutal rape, the Michigan Supreme Court correctly stated that this Court has never extended the "poisonous fruits" doctrine to include the trial testimony of a witness other than the accused. Such a holding has firm roots in *Smith* v *United States,* 324 F2d 879 (DC Cir., 1963). In *Smith, supra,* writing for the majority, then Judge, now Chief Justice, Burger concluded that the testimony of an eyewitness or of a factual witness need not be excluded because his identity was discovered as a result of a statement made by the accused during an illegal detention.

Then Judge Burger stated:

> "Here no confessions or utterances of the appellants were used against them; tangible evidence obtained from appellants, such as the victim's watch, was suppressed along with the confessions. But a witness is not an inanimate object which like contraband narcotics, a pistol or stolen goods, 'speak for themselves.' The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give." (Footnote omitted). *Smith* v *United States, supra,* at p. 881.

Petitioner submits that this was the correct interpretation of the Fifth Amendment of the United States Constitution and of its extension under the "fruits of the poisonous tree", doctrine.

The holding in *Smith, supra,* was reaffirmed in *Brown* v *United States,* 375 F2d 310 (DC Cir. 1967). Concurring, then-Judge Burger stated the same logic which the Michigan Supreme Court relied upon in the instant case:

> "The critical aspect of *Smith-Bowden* is that live witnesses are not 'suppressed', as inanimate objects may be. When an eyewitness is willing to give testimony, under oath and subject to all the rigors of cross-examination and penalties of perjury, he must be heard. *How he came to be in court is a matter which goes only to the weight, not the admissibility, of his testimony.*" (Emphasis supplied). *Brown* v *United States, supra,* at p. 319.

Smith, supra and *Brown, supra,* illustrate that the United States Court of Appeals for the District of Columbia and the Chief Justice of the United States Supreme Court agree with the constitutional interpretation of the Michigan Supreme Court. The United States Court of Appeals for the Sixth Circuit, however, disagrees and on the same facts imposes a more restrictive interpretation of the Fifth Amendment and its extension under the "poisonous fruits" doctrine.

The Sixth Circuit relied upon *Wong Sun* v *United States,* 371 US 471 (1963) in affirming the decision of the United States District Court in this matter. One of the more recent cases decided involving this issue also lends support to the decision of the Sixth Circuit. Curiously enough, the case, *United States v Alston,* 311 F. Supp 296 (DC Cir. 1970), arose out of the United States

District Court, District of Columbia, and rejected the underlying rationale set forth by then-Judge Burger in *Smith, supra,* and *Brown, supra.* After a review of applicable legal authorities, Judge Gesell concluded that this constitutional issue represents an area in which the United States Supreme Court has yet to provide any guidance:

> "None of the Supreme Court cases have dealt specifically with the simple fact situation of a complaining witness whose identity is learned through illegal means and who, quite naturally, agrees to testify upon being contacted. The three leading cases involved either tangible evidence or testimony of a co-defendant. In the factual context of this case, neither the *Wong Sun* standard nor earlier statements of the rule articulate a clear basis for determining when testimonial evidence is sufficiently purged of the primary taint (and thus attenuated) and when it is the product of exploitation. *The Supreme Court has, in short, not been faced with the fundamental choice, necessary in this context, between two conflicting theories:* (1) that contact by the police of a witness whose identity is immediately obtained from the illegal article is by itself a form of exploitation of the primary illegality such that subsequent testimony must be suppressed; or (2) that the decision of a witness to testify and the jury's evaluation of his testimony are independent, intervening factors which attenuate the taint." (Emphasis supplied). *United States* v *Alston, supra,* at p. 298.

This issue will continually be resolved in differing manners in state supreme courts, federal trial courts, and federal appellate courts until this Honorable Court offers a definitive opinion as to the admissibility of the testimony of such a witness.

The conflicting opinions concerning this important constitutional issue have been discussed to illustrate the need for action by this Honorable Court. The Michigan Supreme Court and the United States Court of Appeals for the Sixth Circuit are in direct conflict. The Sixth Circuit and the United States Court of Appeals for the District of Columbia are in direct conflict. The District of Columbia Circuit and the United States District Court, District of Columbia, are in direct conflict. The existence of such conflicts point out that this issue is ripe for consideration by this Court.

Though admittedly a secondary consideration before this Court, this Petitioner, as an elected official, would be derelict in his duties if he did not present the fact that this is also an extremely important case to the People of the State of Michigan. Due to the *habeas corpus* powers of the federal courts, the People of Michigan are now the aggrieved party, unless this Court acts. A vicious rapist will be turned loose even though a unanimous Michigan Supreme Court has affirmed his conviction.

In fairness to all the lower courts that have ruled in this case, each has noted that there exists no definitive opinion concerning this federal constitutional question. Each court has had to resolve the issue based upon its own judgment. The United States District Court judge pointed this out succinctly in his opinion. After reviewing the leading cases concerning "the fruits of the poisonous tree," the judge set forth the following quotation from this Court's opinion in *Harrison* v *United States*, 392 US 219 (1968):

> "We have no occasion in this case to canvass the complex and varied problems that arise when the trial testimony of a witness other than the accused

> is challenged as 'the evidentiary product of the poisoned tree.'" (Footnote 9) *Harrison* v *United States, supra,* at p. 223.

This complex and varied problem is presented squarely to this Honorable Court in this Petition for a Writ of Certiorari.

II.

Petitioner is well aware that this Court set forth certain standards which must be met to protect a defendant's Fifth Amendment rights in *Miranda* v *Arizona, supra.* While in total agreement that such an important constitutional right must be carefully protected, Petitioner urges that confessions may be intelligently and voluntarily made, *in some instances,* even absent the *Miranda* warnings.

In the instant case, no confession was ever made, but information was given to the police by the defendant which resulted in the discovery of a key witness. Petitioner submits that such information was voluntarily and intelligently given even though the defendant was not advised of his right to a court-appointed lawyer. This Court, in *Harris* v *New York,* 401 US 222 (1971), illustrated a willingness to allow evidence to be admitted in some circumstances when proper *Miranda* warnings had not been given. Petitioner urges that the instant case presents a factual situation that would merit such an interpretation of *Miranda, supra.*

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

L. BROOKS PATTERSON
Prosecuting Attorney
Oakland County
State of Michigan
By: ROBERT C. WILLIAMS
Chief Appellate Counsel

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS

(U. S. Court of Appeals—Sixth Circuit)

(Filed June 21, 1973)

Thomas W. Tucker,
Petitioner-Appellee,
v.
Perry Johnson, Warden,
State Prison of Southern Michigan,
Respondent-Appellant.

Civil Action
#37533

Before: Celebrezze, Miller and Lively, Circuit Judges.

This is a 28 U.S.C. Sec. 2254 proceeding in which the petitioner challenged his conviction for rape, in a state court trial. The petition was granted by the district court without an evidentiary hearing. Without a full *Miranda* warning, the Petitioner gave the investigating officers the name of an "alibi" witness. However, this witness did not support the alibi and the evidence was offered and admitted against the Petitioner in his state court trial.

We agree with the district court's holding that this evidence was "fruit of the poisonous tree" and was admitted in violation of the Petitioner's constitutional rights enunciated in *Wong Sun v. United States,* 371 U.S. 471 (1963). On this issue we are in full agreement with the opinion of the district court.

We also agree with the district court that the admission of this evidence was not harmless error beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967).

Since the parties stipulated that there was no independent source for the state to acquire knowledge of the witness, and since the case was presented to the district court upon a motion to dismiss supported by an affidavit and by the files and record of the state court trial, the respondent is not in a position to complain because the district court did not hold a formal evidentiary hearing.

The judgment of the district court is hereby AFFIRMED.

Entered by Order of the Court

/s/ James A. Higgins,
Clerk.

OPINION OF THE UNITED STATES DISTRICT COURT

Entered December 22, 1972

(U. S .District Court—Eastern District of Michigan—Southern Division)

(Filed December 26, 1972)

Thomas W. Tucker,
Petitioner,

v.

Perry Johnson, Warden,
State Jrison of Southern Michigan,
Respondent.

This is a petition for a writ of habeas corpus filed by Thomas W. Tucker, an inmate of Southern Michigan Prison, serving a twenty to forty-year sentence for the crime of rape following conviction by a jury in a Michigan State Court. He has exhausted all available state remedies.

On April 19, 1966, Marion Corey was found tied, gagged and partially disrobed in her home by a friend, Luther White. She had been severly beaten and was incoherent. She was 43 years old and lived alone. She has never recalled what happened to her and has never identified the petitioner or anyone else as her assailant.

When White arrived, he discovered a dog inside the house. Later the dog was seen outside the house. Police followed it to petitioner's house where it curled up on the porch. Questioning of the neighbors revealed that the dog belonged to petitioner and his parents who lived in the house. On the basis of this information, petitioner was picked up by police.

When petitioner was taken to police headquarters, scratches were observed on his face and blood was found on his clothing. He told the police that the scratches and blood were caused by a goose that he had killed. At trial his work foreman testified that petitioner had told him the same story. However, there was testimony that tests conducted on the blood stains on his clothing indicated that it was human blood.

Petitioner was interrogated by the police after his arrest. Although they warned him that he had the right to remain silent, they omitted any statement of his right to court-appointed counsel. During the interrogation, petitioner stated that at the time of the crime he was with a friend, Robert Henderson. The police attempted to confirm this alibi and contacted Henderson who told police that he was not with petitioner at the time in question. In fact, Henderson told police that when petitioner came to his house later in the day of April 19, his face was covered with scratches. When Henderson inquired of petitioner "if he got hold of a wild one or something," petitioner

replied, "Something like that." Henderson waited a few minutes and asked petitioner who it was. Petitioner responded that it was "some woman who lived the next block over. She is a widow woman—in her thirties or something."

On the trial of the case, the statements made by defendant to the police were not admitted because they were held to have been taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The interrogation on April 19, 1966 preceded the *Miranda* decision. But petitioner's trial was subsequent to the rendering of the opinion in *Miranda* on June 13, 1966, and in *Johnson v. New Jersey*, 384 U.S. 719 (1966), the court held *Miranda* to be applicable to trials commencing subsequent to that date. Thus, the *Miranda* decision was applicable to statements taken from petitioner and sought to be introduced at trial. Although the trial court excluded those statements, it allowed the introduction of testimony by Henderson on the prosecution's case in chief. The substance of this testimony is set forth above. The prosecution's knowledge of Henderson was admittedly obtained only through those statements made by petitioner without a proper warning of his constitutional rights.

Petitioner now raises an issue thus far not considered by the Supreme Court, namely, does the introduction by the prosecutor in its case in chief of testimony of a third person which is admittedly the fruit of an illegally obtained statement by the petitioner, violate petitioner's Fifth Amendment rights? Reluctantly, we hold that it does and that, therefore, the writ must be granted.

What we are essentially deciding in this case is whether or not the exclusionary rule shall be extended to cases of this kind. Beginning with *Silverthorne Lumber Company*,

Inc. v. United States, 251 U.S. 385 (1920), the Supreme Court has consistently held that the prosecution may not prove its case through illegally obtained evidence or any derivative thereof. As Justice Holmes said in *Silverthorne,* at p. 392:

> "The evidence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

This rule was expanded in *Wong Sun v. U.S.,* 371 U.S. 471 (1963), in which case the court held that testimonial evidence elicited from the petitioner Toy at the time of his illegal arrest was inadmissible and should have been excluded. Thus, the "fruits" of Fourth Amendment violations were held inadmissible. In *Wong Sun,* the court went further and held that narcotics obtained as a result of Toy's statement should have been excluded as a fruit of the original illegal arrest. Thus it is clear that evidence obtained from statements elicited in violation of Fourth Amendment rights is inadmissible.

In *United States v. Wade,* 388 U.S. 218 (1967), and *Gilbert v. California,* 388 U.S. 263 (1967), the court held an in-court identification by a witness who had viewed defendant-petitioner at a line-up before trial in the absence of counsel in violation of petitioner's Sixth Amendment rights should have been excluded from trial. Of course, if the in-court identification was not based on the previous

line-up, but of independent origin, the court said that the in-court identification would be proper. The court remanded the cases to give the prosecution an opportunity to demonstrate that the in-court identification was made independently of the pre-trial line-up. In *Gilbert,* the court went on to say, however, that testimony of witnesses at trial stating that they had identified the defendant at the pre-trial line-up had to be excluded since the line-up of which they testified was illegal. "That testimony is the direct result of the illegal lineup 'come at by exploitation of [the primary] illegality.' *Wong Sun . . .*" (brackets not inserted). Thus it is clear that testimony of third parties which is obtained as the result of a violation of Sixth Amendment rights of the accused, cannot be introduced against the accused at trial.

In a situation involving the Fifth Amendment, the Supreme Court has held that testimony of an accused could not be introduced at a subsequent trial where the testimony at the first trial was induced by use of accused's confession taken in violation of the Fifth Amendment. Thus, in *Harrison v. United States,* 392 U.S. 219 (1968), the court said, "[T]he petitioner testified [at trial] only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree, to invoke a time-worn metaphor." Citing *Silverthorne Lumber, supra.* The court noted, however, in footnote 9 on page 223, that,

> We have no occasion in this case to canvass the complex and varied problems that arise when the trial testimony of a witness other than the accused is challenged as "the evidentiary product of the poisoned tree."

The case described in the footnote is precisely the case before this Court.

On the basis of these cases, this Court finds that the testimony of Henderson should have been excluded from petitioner Tucker's trial. We find no distinction between the value placed upon the Fourth, Fifth and Sixth Amendments. Thus, if testimonial fruits of violation of the Fourth and Sixth Amendments may not be introduced into evidence at trial, testimonial fruits obtained from violations of Fifth Amendment rights should also be inadmissible.

We are aware that the Supreme Court has indicated in the case of *Harris v. New York*, 401 U.S. 222 (1971), that *Miranda* does not prevent all uses of a statement taken without the required warning. In *Harris*, the court held that statements taken in violation of *Miranda*, although inadmissible on the prosecution's case in chief, could be used on cross-examination of the defendant for purpose of impeaching his credibility. But the court seemed quite concerned with the fact that no use of the statements was made during the prosecution's case in chief. Thus, whatever inroads have been made on the collateral uses of *Miranda*, it is nevertheless clear from *Harris* that what the prosecution does on its case in chief will still be carefully scrutinized.

The purpose of the exclusionary rule of course is to deter illegal police conduct and to prevent the acquisition of evidence through the violation of a defendant's constitutional rights. Justice White argued in his dissent in *Harrison* that the *Miranda* rule excluding all statements procured in custody without adequate warning is so clear and so strong that no additional deterrent was necessary under the facts of that case. It could be argued in our

case that no officer would chance violating *Miranda* in the hope of obtaining leads to other inculpatory evidence.

But we are not impressed with this argument. Whatever the motivation of a government agent in failing to warn a defendant, the government should not be allowed to benefit from the violation of the defendant's rights.

We note that the defendant's statement to the police which led to the discovery of Henderson was basically exculpatory in nature. In fact, it constituted an alibi that the police were duty bound to investigate. Nevertheless, both exculpatory and inculpatory statements are covered by *Miranda,* 384 U.S. at 476-477. Moreover, as pointed out by the Supreme Court in *Wong Sun,* 371 U.S. at 487, although the statement was exculpatory, it "turned out to be incriminating, for [it] led directly to evidence which implicated [petitioner]." Thus, we find the exculpatory nature of these statements to be irrelevant.

Of course, the statements excluded in *Wong Sun* and *Harrison* were those of the defendants whose rights were violated. But in *Wade* and *Gilbert* the testimany excluded was that of third persons. Thus the fact that a third person's testimony as opposed to petitioner's testimony is at issue is not significant. The testimony is no less the result of the illegal interrogation merely because it was made by a third party.

Having determined that the testimony in question was inadmissible at petitioner's trial, we must nevertheless consider whether or not this error was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967). We have read the transcript of petitioner's trial and conclude that Henderson's testimony was crucial to the prosecution's case. The error in receiving this testimony was not harmless beyond a reasonable doubt.

For these reasons, IT IS HEREBY ORDERED that the writ be and is hereby granted and petitioner shall be released from custody within ninety (90) days from this date unless a new trial is commenced within that time.

/s/ Ralph M. Freeman
Ralph M. Freeman
United States District Judge.

Dated: December 22, 1972.

OPINION OF THE MICHIGAN SUPREME COURT

People v. *Tucker*

Appeal from Court of Appeals, Division 2, Lesinski, C.J., and Quinn and Danhof, JJ., affirming Oakland, Clark J. Adams, J. Submitted June 10, 1971. (No. 13 June Term 1971, Docket No. 52,674½.) Decided August 27, 1971.

19 Mich App 320 affirmed.

Thomas Wayne Tucker was convicted of rape. Defendant appealed to the Court of Appeals. Affirmed. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas G. Plunkett,* Prosecuting Attorney, and *Dennis Donohue,* Chief Appellate Counsel, for the people.

William R. Vander Kloot and *Charles J. Porter,* for defendant.

Black, J. *(for affirmance).* To the extent one Justice of this Court may so do, I adopt the carefully detailed and thoughtfully considered opinion of Judge Danhof, writing for Division 2 (19 Mich App 320), and therefore vote to affirm.

When and if the United States Supreme Court rules that the otherwise admissible testimony of a disinterested witness, such as Mr. Henderson gave here (see 19 Mich App at 324), must be rejected as fancied or authentic "fruit" of that rhetorized "poisonous tree", I will follow obediently our uniformly executed oath. But that day has not quite yet arrived, as the counsel on appeal for defendant concede* in the course of their effort to persuade that *this* Court should extend—"logically" of course—the rules of exclusion that were laid down in *United States v. Wade* (1967), 388 US 218 (87 S Ct 1926, 18 L Ed 2d 1149), and in *Wade's* companion, *Gilbert v. California* (1967), 388 US 263 (87 S Ct 1951, 18 L Ed 2d 1178).

An unusually strong showing of guilt, echoed by the jury's verdict, discloses that this professional felon committed a loathsomely bestial rape of a middle aged lady. There alone in her own home, she must have fought valiantly before submission or unconsciousness, for scratches of the defendant's face were so noticeably marked, by successive witnesses hours later, as to form an important part of the people's proof. The result of her defensive effort was a beating so vicious that she was unable to recall what happened or to identify her assailant. In the absence of reversible error—of which there simply is none—that assailant should not be granted a new trial; a new trial which, in these days of more and more shackling of law enforcement, usually means an order for out-

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* Counsel say, forthrightly in their brief:

"While both *Wade* and *Gilbert* involved verbal evidence of witnesses they did not consider the primary issue involved here, namely, whether in the absence of lineup or search problems, the identity of a witness discovered during illegal interrogation taints the witness's subsequent testimony and requires its exclusion."

right release upon society of one whose record justifies the latest sentence imposed.

Adams, T. E. Brennan, Swainson and Williams, JJ., concurred with Black, J.

T. M. Kavanagh, C.J., and T. G. Kavanagh, J., concurred in the result.

OPINION OF MICHIGAN COURT OF APPEALS

People v. *Tucker*

1. *Constitutional Law—Fourth Amendment—Evidence—Illegal Acquisition—Use.*

   The essence of the Fourth Amendment to the United States Constitution, which forbids the acquisition of evidence in a certain way, requires that illegally acquired evidence not only shall not be used in court, but also that it shall not be used at all.

2. *Evidence—Exclusionary Rule.*

   The federal "exlusionary rule", forbidding the use of illegally acquired evidence, extends to verbal statements as well as to tangible materials.

REFERENCES FOR POINTS IN HEADNOTES

[1] 29 Am Jur 2d, Evidence §§ 410-412.

[2] 29 Am Jur 2d, Evidence § 414.

[3] 29 Am Jur 2d, Evidence § 416.

[4] 29 Am Jur 2d, Evidence §§ 416, 440.

[5] 29 Am Jur 2d, Evidence §§ 415, 531.

[6] 5 Am Jur 2d, Arrest § 1.

[7] 29 Am Jur 2d, Evidence §§ 249, 259, 288, 298.

[8] 30 Am Jur 2d, Evidence § 1140 *et seq.*

3. *Evidence—Witnesses—Identity—Exclusion.*

That the identity of a witness was learned by illegal means is insufficient to warrant exclusion of that witness's testimony, inasmuch as mere knowledge of that witness's identity does not guarantee that his testimony would be favorable to the prosecution; the court should weight all the revelant factors including the possibility that the witness might have voluntarily contacted police even without their knowing his identity and the fact that his testimony has remained unchanged from the start.

4. *Criminal Law—Evidence—Witnesses—Alibi—Admissibility.*

The testimony of an alibi witness whose name was given to police by defendant was admissible where the police officers were fulfilling their duty towards defendant in checking his alibi since it could be expected that the alibi witness's testimony would be favorable to the defendant, whose in-custody interrogation was within the guidelines set by the United States Supreme Court as expressed up to that time.

5. *Criminal Law—Evidence—"Fruit of the Poisonous Tree"—Purpose.*

One purpose of the rule excluding "fruit of the poisonous tree" is to deter unlawful police conduct but no such deterrent effect could be obtained by extending the rule to the case of one accused of rape where his custodial interrogation about that crime complied with the United States Supreme Court guidelines as expressed up to that time.

6. *Criminal Law—Suspect—Detention—Examination—Driver's License—Arrest.*

Police officer's action in stopping defendant to examine his driver's license after being advised of the name of a person wanted for questioning in a rape and make of an auto being driven by him was not an arrest, there being no intent by the officer to take defendant into custody until after the officer had learned the defendant's name from his license.

7. *Criminal Law—Witnesses—Testimony—Identification—Jury—Weight.*

Witness's identification of a dog that he had seen in the home of a rape victim as being the same dog later identified as belonging to the defendant charged with the rape was based on an original observation and was admissible, the weight to be given to the testimony being for the jury.

8. *Criminal Law—Rape—Corpus Delecti—Testimony—Victim—Physician.*

The *corpus delecti* in forcible rape cases is usually established by the victim's testimony but where the victim is unable to remember what happened, a physician's testimony that the victim's hymen had been ruptured within hours of his examination and that sperm were present in her vagina, plus the fact that she was discovered tied, gagged, beaten and incoherent, will establish the *corpus delecti* (MCLA § 750.520).

Appeal from Oakland, Clark J. Adams, J. Submitted Division 2 May 9, 1969, at Lansing. (Docket No. 5,019). Decided October 1, 1969. Application for leave to appeal filed December 17, 1969.

Thomas Wayne Tucker was convicted of rape. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Thomas G. Plunkett,* Prosecuting Attorney, and *Dennis Donohue,* Chief Appellate Counsel, for the people.

Bratton, Vander Kloot & Young, for defendant.

Before: Lesinski, C.J., and Danhoff and Quinn, JJ.

Danhof, J. The first trial of defendant ended in a mistrial for reasons not presently relevant. The second trial resulted in a jury conviction of rape[1] and a sentence on November 9, 1966, of 20 to 40 years imprisonment. The defendant has brought this appeal alleging 8 errors of law which will be discussed *seratim* following a recapitulation of the essential facts.

On April 19, 1966, the victim did not report for work and a male co-worker and friend, Luther E. White, telephoned her home to ascertain the reason for her absence. Receiving no answer, he went to her home in Pontiac township and discovered the victim tied, gagged, and brutally and bloodily beaten. She was partially disrobed and incoherent. The house was in a general and bloody disarray. The victim was 43, had never been married, and lived alone. Neither then nor later could she recall what had happened to her, nor could she identify the defendant.

A dog was in the home at the time Mr. White entered, although, to his recollection, the victim owned no dog. He testified that the dog later got out of the house. Shortly thereafter White was reporting the above facts to an Oakland county sheriff's deputy at the scene when he saw

[1] MCLA § 750.520 (Stat Ann 1954 Rev § 28.788).

the same dog. The deputy followed the dog to a home, approximately 900 feet away on a zig zag course, where the dog sat down in the front yard. Finding no one at home, the deputy checked with a neighbor who told him that the defendant and his relatives lived at the house and that the dog belonged to them, and that defendant drove a red 1959 Ford. The deputy telephoned his information to the sheriff's department about noon.

At 4 p.m. that day Officer Lindberg of the Pontiac police department telephoned the Oakland county sheriff's department and learned of the crime from an unnamed person, and that a certain named suspect was driving a red 1959 Ford. At approximately 9 p.m. the same day, Officer Lindberg saw a red 1959 Ford automobile leaving the city and entering Pontiac township. The officer had no knowledge of defendant's physical description and had not observed any traffic violation, but he ordered the car to stop and demanded the driver's license of the operator, who was the defendant. The officer noted that the last name on the license was the same as that given him by the sheriff's department, but that the first and middle names were reversed. The defendant was taken to the sheriff's department where scratches were observed on his face and blood on his clothes, including his underclothing.

Defendant was advised of his right to remain silent and related matters, but he was not advised that he had a right to a court-appointed attorney if he was too poor to afford one himself. He was interrogated and said that at the time the crime was committed he was with Robert Henderson. When contacted, Henderson stated that the defendant was not with him at the time defendant claimed and that defendant's scratched face was not from a goose that Henderson and defendant had shot, as defendant

claimed, since defendant already had these scratches on his arrival at Henderson's. Additionally, Henderson stated that he had asked the defendant if he had "got hold of a wild one," and defendant responded that it was a "widow woman or something like that" about in her thirties, who lived the next block over.

The existence of the scratches on defendant's face was corroborated by his work foreman to whom he had said, as he did to the police, that they were from the flailing of a goose.

A staff physician at Pontiac General Hospital determined that the victim needed extensive sutures in her vaginal area, that sperm was present inside her vagina, and that she had a recently ruptured hymen.

Defendant has been represented at the trial and on appeal by able court-appointed counsel.

The issues raised and our resolution of them follow:

1. *May testimony of a prosecution witness be taken where the identity of that witness was discovered solely through an interrogation of the defendant which did not meet the standards of the United States Supreme Court case of* Miranda *v.* Arizona?

At the time of defendant's interrogation on April 19, 1966, he was advised of his rights as delineated by *Escobedo* v. *Illinois* (1964), 378 US 478 (84 S Ct 1758, 12 L Ed 2d 977). Defendant did not request the presence of an attorney during his interrogation, and no claim is made that his rights under *Escobedo* were violated.

Almost two months *after* defendant was questioned, the United States Supreme Court decided, on June 13, 1966, in *Miranda* v. *Arizona* (1966) 384 US 436 (86 S Ct 1602,

16 L Ed 694, 10 ALR3d 974), that any statements of a defendant obtained during custodial interrogation would be excluded from evidence at trials unless certain warnings or information had been given prior to the interrogation, including the information that the defendant was entitled to a court-appointed attorney if he could not afford to hire a lawyer.

One week after *Miranda* was decided, the case of *Johnson* v. *New Jersey* (1966), 384 US 719 (86 S Ct 1772, 16 L Ed 2d 882), held that *Miranda* would apply only to trials commenced after the decisional date of *Miranda,* June 13, 1966. Since defendant Tucker's trial began on October 18, 1966, the *Miranda* decision applied to his trial and accordingly *the statements that the defendant made during the interrogation were excluded from evidence at his trial.*

We are now presented with the question of whether the exlusionary rule enunciated in *Miranda, supra,* should be extended to include the application of the "fruit of the poisonous tree" doctrine to evidentiary leads obtained from interrogations which were apparently legal at the time of their occurrence, but nevertheless fall into that limbo created by *Johnson, supra,* due to the fact that such interrogations occurred before the decisional date of *Miranda,* but involved cases that went to trial after the decisional date of *Miranda.*

The earliest application of the "fruit of the poisonous tree" doctrine listed in 8 Wigmore, Evidence (McNaughton Revised 1961, § 2184a, p. 40, was in *Silverthorne Lumber Company, Inc.* v. *United States* (1920), 251 US 385 (40 S Ct 182, 64 L Ed 319). The case concerned an illegal seizure of books, papers, and documents, portions of which federal agents photographed before returning. Justice Holmes, writing for the court, said:

"The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. *Weeks* v. *United States* (1914), 232 US 383 (34 S Ct 341, 58 L Ed 652, LRA 1915B 834, Ann Cas 1915C, 1117) to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words, 232 US 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

In another leading case, *Wong Sun* v. *United States* (1963), 371 US 471 (83 S Ct 407, 9 L Ed 2d 441), the exclusionary rule expressed in *Silverthorne, supra,* was extended to verbal statements as well as to tangible materials, the court finding no logical distinction between the two for the purpose of deterring illegal search and seizure by law enforcement personnel.

The Federal Court of Appeals for the District of Columbia has set forth guidelines applicable to our case in *McLindon* v. *United States* (1964), 117 App DC283 (329 F2d 238), as follows:

"In each case the court must determine how great a part the particular manifestation of 'individual human

personality' played in the ultimate receipt of the testimony in question. Indications in the record that mere knowledge of the witness's identify would not inevitably guarantee that his testimony would be favorable to the prosecution; that the witness might eventually have voluntarily gone to the police even without their knowing his identity; that his testimony has remained unchanged from the start—all are relevant factors to be considered in determining the final outcome."

The defendant urges us that the rule to be applied in our case is the rule applied in *People* v. *Peacock* (1968), 29 App Div 2d 762 (287 NYS2d 166, 167, 168):

"Defendant was tried on July 13, 1966, subsequent to the decision in *Miranda* * * * and hence his inculpatory statements, made without the warnings which *Miranda* requires, were inadmissible in evidence. * * In point of fact, defendant's statements were not used against him at the trial. He urges, however, that absent his statements the owner of the property (who testified at the trial) would not have been known and the identification of the articles seized could not have been made. In short, he argues that the proof against him at the trial was the tainted fruits *(sic)* of the illegally obtained statements.

"If, indeed, defendant's admissions were the source of the proof against him, we would hold, consistent with the *rationale* in the cases relating to the use of evidence proceeding from an illegal search and seizure, that the fruits of the unlawful conduct in eliciting the admissions without the mandated warnings were equally excluded (citations omitted)."

Peacock is not controlling on this Court and we chose not to follow it. We find the dissenting opinion in *Peacock*

more persuasive than the majority one. We quote with approval from that dissenting opinion:

"In any event, we are of the opinion that the 'fruit of the poisonous tree' doctrine should not be strained so as to extend its exclusionary rule to a complaining witness such as the one at bar who, in the ordinary course of events, could be expected to have come forward voluntarily to report the burglary at her home independently of any police investigation allegedly precipitated by defendant's inculpatory illegally obtained admissions and without being prodded into doing so as might conceivably be necessary in the case of a recalcitrant witness who is not a victim of the crime [cf. *Smith* v. *United States* (1965), 120 App DC 160 (344 F2d 545, 547), *McLindon* v. *United States* (1964), 117 App DC 283 (329 F2d 238, 241, n. 2); *United States* v. *Tane* (CA2, 1964), 329 F2d 848, 853]. It is our view that to extend the exclusionary rule to the testimony of such complainant would tend to undermine the doctrine's primary design to protect the innocent and relegate it to the less commendable function of providing technical loopholes for the beneft of the guilty. To subscribe to this would be to discourage and frustrate thorough and expeditious investigations, lest the authorities find themselves the victims of their own efficiency."

Furthermore, in *People* v. *Dannic* (1968), 30 App Div 2d 679 (292 NYS2d 257), four of the five judges who sat in *Peacock, supra,* said:

"In our opinion, assuming an illegal confession, for the fruit of the poisoned tree doctrine to be operative, a causal chain must be shown to exist from the primary illegality to the procurement of and the effect upon the substance of the evidence sought to be employed. A bare finding that the identity of witnesses was learned by illegal means is

insufficient to warrant exclusion [cf. *Wong Sun* v. *United States* (1963), 371 US 471 (83 S Ct 407, 9 L Ed 2d 441); *People* v. *Rodriguez* (1962), 11 NY2d 279 (229 NYS 2d 353, 183 NE2d 651); *Smith* v. *United States* (1963), 117 App DC 1, (324 F2d 879); *McLindon* v. *United States* (1964), 117 App DC 283 (329 F2d 238); *United States* v. *Tane* (CA2, 1964), 329 F2d 848; *Smith* v. *United States* (1965), 120 App DC 160 (344 F2d 545); *People* v. *Scharfstein* (1967), 52 Misc 2d 976 (277 NYS2d 516)].

"Before determining the instant motion to suppress, several questions should have been answered: (1) if it be assumed that no statement had been made by defendant to the police, would Cather and O'Connor have come forward voluntarily; (2) if not, would the police have reasonably been expected to learn their identity by an independent investigation; and (3) apart from revealing their identity, to what use, if any, was the illegally obtained information put in procuring the testimony of the witnesses and in affecting the substance thereof."

Defendant's reliance on *Harrison* v. *United States* (1968), 392 US 219 (88 S Ct 2008, 20 L Ed 2d 1047), is misplaced. The court held that testimony by the defendant at a prior trial was inadmissible upon retrial because it was probably given to overcome the impact of confessions illegally obtained and introduced into evidence, and was tainted by the same illegality that rendered the confessions themselves inadmissible. The Supreme Court specifically reserved decision on the type of case before this Court, saying in footnote 9:

"We have no occasion in this case to canvass the complex and varied problems that arise when the trial testimony of a witness other than the accused is challenged as 'the evidentiary product of the poisoned tree'."

None of the cases reviewed present precisely the same fact situation involved in the case before us.[2] We specifically note that witness Henderson was contacted initially by law enforcement authorities as an alibi witness on behalf of the defendant. Had he supported the defendant's statement that he was scratched by the flailings of a goose, defendant might never have stood trial for the crime of which he has been convicted. Furthermore, could anyone think that the officers had fulfilled their duty towards defendant, had they chosen not to check out his alibi?

One purpose of the rule excluding "fruit of the poisonous tree" is to deter unlawful conduct by police. No such deterrent effect could be obtained by extending the doctrine to the defendant's case wherein the custodial interrogation complied with United States Supreme Court guidelines as expressed up to that time.

Additionally, witness Henderson, not being a participant in the crime, might well have come forward voluntarily with his testimony, and certainly there was no inevitable guarantee that his testimony would be favorable to the prosecution. In fact, as a proffered alibi witness, quite the opposite was to be expected. We have considered the guidelines quoted from *McLindon, supra*, and also those in *Dannic, supra*, and we hold that the testimony of witness Henderson was admissible.

Jenkins v. *Delaware* (1969), 395 US 213 (89 S Ct 1677, 23 L Ed 2d 253), decided after the instant case was ar-

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[2] An exception to the "fruit of the poisonous tree" doctrine has been recognized when knowledge of the tainted information was gained from an independent source, *Silverthorne, supra*, cited in *Wong Sun* v *United States, supra*. This exception has no application to the facts of the present case.

gued, held that *Miranda, supra,* did not apply to any retrial of a defendant whose first trial commenced prior to June 13, 1966.[3] Our decision not to extend the exclusionary rule stated in *Miranda, supra,* to witness Henderson's testimony is consistent with that case.

2. *Does the stopping of a motor vehicle by a police officer on duty and in uniform to examine the driver's license of the motor vehicle operator constitute an arrest of that operator?*

The defendant states in his reply brief that "The 'real issue' is to determine under what conditions a police officer may stop (arrest) the defendant to demand the license". There is an assumption in that statement that we are not willing to make, namely, that stopping a driver to examine his driver's license is an arrest.[4] The cases cited by defendant relative to this issue are factually distinguishable, a number of them because they involve a stopping for a traffic violation and a subsequent seizure of evidence.

In the present case, Officer Lindberg did not stop defendant because of any traffic violation, but rather because he was looking for a man named Wayne Thomas Tucker, driving a red 1959 Ford, who was wanted for questioning about a rape. There was no intent to take the defendant into custody until after his driver's license was examined and his name thereby revealed.

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[3] Citing the *Jenkins* decision, the Michigan Supreme Court held in *People* v. *Woods* (1969), 382 Mich 128, 139 that *Miranda* does not apply to the retrial of a defendant whose first trial commenced prior to June 13, 1966.

[4] MCLA § 257.311 (Stat Ann 1968 Rev § 9.2011) requires the operator of a motor vehicle to have in his immediate possession a license which he shall display upon demand of any uniformed police officer.

We hold that such a stopping did not constitute an arrest.

3. *Does a police officer's telephone call to another police department, answered by some unrecalled person who volunteers that such department seeks in connection with a specific crime, a named, but undescribed suspect, unknown to the officer, driving a vehicle of unknown license, specific make, year and color, constitute probable cause for the officer to arrest a driver of a car so modeled, dated and colored, but not otherwise suspicious, observed five hours later in a different, adjoining and populous municipality at least twelve hours after the alleged crime was committed?*

Our resolution of question 2 makes it unnecessary to rule on this issue.

4. *Is a layman's testimony that a certain dog he observed at one time is the same as a dog observed at a later time a conclusion or opinion which would require, if admissible at all, that the witness first set forth all facts on which he bases such conclusion or opinion?*

Witness White was unequivocal in his identification of the dog in the yard as the same as the dog that was in the victim's house when he arrived. Defendant objected to the admission of this testimony as a conclusion or opinion of the witness not based on supporting facts. However, according to 7 Wigmore, Evidence (3d ed), § 1977:

"The opinion rule has been used as a bludgeon against every conceivable sort of testimony, even against such simple statements as estimates of *distance, time, size, identity,* and the like. Fortunately, however, such attempts have been usually unsuccessful in that class of cases."

In *People* v. *Quigley* (1921), 217 Mich 213, it was claimed that there was no competent evidence identifying defendants as the persons who committed the robbery. There was testimony that the defendants had the "general appearance" of the persons who committed the robbery. The Court stated, p 222:

"There was other testimony of about the same general tenor. Such testimony was competent, and the weight to be given it was a question for the jury in view of all the other circumstances and the evidence in the case."

A similar result was reached in *People* v. *Greeson* (1925), 230 Mich 124. We hold that witness White's unequivocal testimony regarding identification of the dog based on original observation was admissible and that the weight to be given it, as affected by the defendant's cross-examination, was a matter for the jury.

5. *Did the witness Patricia Ann Bradley demonstrate sufficient knowledge to be able to testify that the dog referred to in question 4 belonged to the Tuckers?*

Witness Bradley testified that she had lived across the street from defendant for 9 years, had seen defendant about once a week, that the dog belonged to the Tuckers, and that it was inclined to follow members of the Tucker family.

There is no merit in the contention that her testimony was inadmissible.

The citation of cases relative to the admissibility of evidence of dog tracking have no relevance to the facts of this case.

6. *Assuming,* arguendo, *that the testimony objected to in questions 4 and 5 is otherwise admissible, should such*

testimony nevertheless have been excluded because it is an impermissible inference to conclude therefrom that the dog followed this defendant-appellant to the victim at the place and time of the offense charged?

Defendant argued that testimony relative to the dog was inadmissible because an inference cannot be drawn upon an inference.

Such argument fails because only one inference is involved; namely, from the factual testimony that defendant's dog sometimes followed him and was in the victim's house, the jury could infer that it had followed him there.

The testimony by witnesses White and Bradley relative to the dog was admissible for the jury to consider in arriving at a verdict.

7. *Is a microscope slide allegedly showing sperm with testimony by the medical doctor who secured the alleged smear of sperm that such sperm was within the vagina of the alleged victim admissible in a rape case when the doctor further states that he would have no way of knowing whether sperm was on the slide before the test was taken although he testified over objection that the "procedure" was to use fresh slides for each such examination?*

The medical doctor testified that the slide was a "new slide, an unused slide," and "was taken from a container from the manufacturer." This was an adequate foundation for the admission of the slide and the doctor's testimony relative to it. Other considerations brought out by cross-examination went to the credibility of the evidence, not its admissibility.

The "chain of custody" cases cited by defendant are not pertinent to the facts of this case.

8. *Is testimony by the examining physician in a rape case that the victim had a perineal laceration of the female genitalia on the outer surface of the vagina with "penetration" rupturing of the hymenal ring, which he concluded occurred within hours of his examination, indicating "recent trauma," but that he could not conclude what happened to the victim except that she was "assaulted" (and this conclusion was based in part on conversation with unrecalled persons) sufficient to prove* corpus delecti *without the victim's testimony?*

The *corpus delecti* in forcible rape cases is usually readily established by testimony of the victim. That is not true here, however, as the victim could not remember what happened.

Nevertheless, the testimony of the examining doctor that the victim's hymen had been ruptured within hours of his examination and that there was sperm present within the victim's vagina, coupled with the fact that the victim was discovered tied, gagged, horribly beaten, and incoherent, leaves no doubt that the *corpus delecti* was established.

The defendant has had a fair trial and his conviction is affirmed.

All concurred.